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APR 28 2005

In re Application of :
Ohmi, et al. :
Filed: November 10, 2003 : ON PETITION
Application No. 10/706,423 :
Dkt. No.: FUK-140 :

OFFICE OF PETITIONS

This decision is in response to the "PETITION UNDER 37 C.F.R. § 1.53(e) IN REPLY TO NOTICE TO FILE CORRECTED APPLICATION PAPERS: FILING DATE GRANTED," filed November 18, 2004, requesting that the instant application be accorded a filing date of November 10, 2003 because the drawing alleged to have been omitted from the application as filed was incorporated by reference.

The application was filed November 10, 2003. On September 14, 2004, the Initial Patent Examination Division mailed a Notice to File Corrected Application Papers ("Notice") stating, *inter alia*, that the application had been accorded a filing date of November 10, 2003, but that Figure 89 described in the specification appeared to have been omitted.

The Notice permits applicant to either: (1) promptly establish prior receipt in the PTO of the drawing(s) at issue (generally by way of a date-stamped postcard receipt (MPEP 503)), or (2) promptly submit the omitted drawing(s) in a nonprovisional application and accept the date of such submission as the application filing date. An applicant asserting that the missing drawings were in fact deposited in the PTO with the application papers must file a petition (and the appropriate petition fee) with evidence of such deposit. An applicant desiring to submit the omitted drawings in a nonprovisional application and accept the date of such submission as the application filing date must file any omitted drawing(s) with an oath or declaration in compliance with 37 CFR 1.63 and 1.64 referring to such drawing(s) and a petition under 37 CFR 1.182 (with the petition fee under 37 CFR 1.17(h)) requesting the later filing date within two months of the date of the Notice (37 CFR 1.181(f)).

The instant petition and a copy of the missing figure were filed in response to the Notice. The petition states, in effect, that the above-identified application incorporated by reference prior filed application 10/100,533, filed March 18, 2002, which is a divisional of 09/355,229, filed July 26, 1999.

An applicant may incorporate by reference a foreign application by including, in the application-as-filed, a statement that such foreign application(s) is incorporated by reference. The inclusion of this

incorporation by reference of the foreign application(s) will permit an applicant to amend the application to include any subject matter in such prior application(s), without the need for a petition. See, MPEP 608.01(p).

Accordingly, the petition is **DISMISSED**.

In view of the incorporation by reference of prior filed application 10/100,533 which is a divisional of 09/355,229, Figure 89 is not new matter if said figure was part of the disclosure of prior filed application 10/100,533, which is a divisional of 09/355,229. However, the figure submitted with the instant petition has not been entered into the record.

To avoid further delay in the examination of the application, a preliminary amendment amending the application to include the missing figure should be submitted prior to the issuance of the first office action on the merits.

Receipt is hereby acknowledged of the required petition fee.

Petitioners are advised that the instant response to the Notice with respect to the omitted figure is in fact untimely as the time period set forth in the Notice as regards the omitted figure explicitly advised that the time period for response was not extendible pursuant to 37 CFR 1.136. Thus, the instant petition has been considered on the merits at the discretion of the Office. In future, petitioners should adhere to the time limits for response set for in Office communications being especially mindful that a Notice from the Initial Patent Examination Division which addresses separate and distinct issues may in fact set forth more than one period of time for response.

The application is being returned to the Office of Initial Patent Examination for further processing with a filing date of November 10, 2003.

Thereafter, the application will be forwarded to the appropriate group art unit for consideration by the examiner of any amendment that may be filed requesting the entry of a drawing sheet.

Telephone inquiries related to this decision may be directed to the undersigned at (571) 272-3205.



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Office of Petitions